93-506

Supreme Court, U.S.
FILED
SEP 27 1993
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

JEFFREY WILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district judge's mental incapacity caused such a departure from the accepted and usual course of judicial proceedings as to deprive petitioner of due process in the consideration of his motion to dismiss the indictment obtained in violation of *Kastigar v. United States*, 406 U.S. 441 (1972), and in consideration of numerous trial and post-trial rulings that required the exercise of legitimate and meaningful discretion.

PARTIES TO PROCEEDINGS BELOW

The parties below, in addition to the petitioner, were the United States Government, represented by the Assistant United States Attorneys, Patrick J. Reinert and Steven M. Colloton, and Curtis Holub, represented by David McManus and John Wesley Hall, Jr.

TABLE OF CONTENTS

Page

Question Presented . . . . . *i*

Parties to Proceedings Below . . . . . *ii*

Table of Authorities . . . . . *v*

Opinion Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ:

THE PRESIDING JUDGE WAS MENTALLY INCAPABLE OF EXERCISING LEGITIMATE AND MEANINGFUL DISCRETION CAUSING HIM TO SO DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, WHICH THE APPELLATE COURT SANCTIONED, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION 4

Petitioner Was Denied His Right to a Fair Trial Because the Presiding Judge Was Incapable of Exercising Legitimate and Meaningful Discretion in Consideration of His Motion to Dismiss the Indictment Obtained in Violation of ***Kastigar v. United States****, 406 U.S. 441 (1972), and in Consideration of Numerous Trial and Post-Trial Rulings That Required the Exercise of Discretion* 4

A. Introduction and Material Facts 4

B. The Transcript Establishes the Judge's Mental Incapacity to Make Discretionary Rulings 6

Page

C. The Trial Judge Could Not Engage in a Legitimate and Meaningful Exercise of Discretion 16

D. This Court Should Act to Preserve Civilized Standards of Procedure and Evidence 18

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. Fulminante, 499 U.S. 279 (1991) 20

Grunewald v. United States, 353 U.S. 391 (1957) 19

Kastigar v. United States, 406 U.S. 441 (1972) . *i*, *iii*, 3, 4 6, 17

Marshall v. United States, 360 U.S. 310 (1959) 19

McNabb v. United States, 318 U.S. 332 (1943) 18

Metropolitan Life Insurance Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976), *aff'd*, 736 F.2d 727 (D.C. Cir. 1984) 17

Smith v. Cox, 435 F.2d 453, 460 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971) . . . 17

Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) 20

United States v. Bell, 573 F.2d 1040 (8th Cir. 1978) . . 12

United States v. Guglielmi, 929 F.2d 1001 (4th Cir. 1991) 17

United States v. Hale, 422 U.S. 171 (1975) 19

Wabasha v. Solem, 694 F.2d 155 (8th Cir. 1982) 17

STATUTORY PROVISIONS:

18 U.S.C. § 3231 2

28 U.S.C. § 1254(1) 2

CONSTITUTIONAL PROVISIONS:

U.S. CONST. art. III 2

U.S. CONST. amend. V 2

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The petitioner, Jeffrey Wiley, respectfully requests that this Court issue its writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above proceeding on June 28, 1993.

OPINION BELOW

The opinion of the Eighth Circuit is reported at 997 F.2d 378 (8th Cir. 1993), and is reproduced at App. 1-15.

JURISDICTION

The judgment to be reviewed was entered on June 28, 1993. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1). The basis for federal jurisdiction in the district court was 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the United States Constitution:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

This petition arises from the district judge's mental incapacity during the petitioner's trial and sentencing in early 1992. The facts began several years earlier, on February 22, 1988, when the petitioner was arrested in Cedar Rapids, Iowa, allegedly in possession of approximately 82 pounds of marijuana. He was released after agreeing to cooperate while police officers held him in a hotel room, and after consenting to a search of his business premises where the police found approximately 30 pounds of marijuana.

The police interviewed petitioner in the hotel room after representing that the information would not be used against him. A few days later he changed his mind about cooperating. He was not indicted until three and one-half years later, on September 26, 1991. The charges stemmed solely from the crimes relating to the approximately 110 pounds of marijuana seized on February 22, 1988, including the criminal forfeiture of the business known as Jeff Wiley Enterprises and the real property on which the business was located.

The petitioner filed a motion to dismiss the indictment on the grounds that the information he disclosed to the police on the night of February 22, 1988, was being used against him in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). The Honorable Donald J. Porter, Senior U.S. District Judge, District of South Dakota, Central Division, presided over the petitioner's case by designation. Before counsel had any direct involvement with Judge Porter, and before counsel realized that Judge Porter was not mentally capable of making discretionary rulings, he issued an order adopting the magistrate's findings on the motion with some modifications, granting petitioner's motion to supplement the record and denying petitioner's motion to dismiss the indictment.

At trial the petitioner was convicted of the substantive counts, partially through the use of information the police uncovered as a

result of his cooperation on February 22, 1988. The jury also returned a verdict forfeiting his real property and his business.

REASONS FOR GRANTING THE WRIT

THE PRESIDING JUDGE WAS MENTALLY INCAPABLE OF EXERCISING LEGITIMATE AND MEANINGFUL DISCRETION CAUSING HIM TO SO DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, WHICH THE APPELLATE COURT SANCTIONED, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner Was Denied His Right to a Fair Trial Because the Presiding Judge Was Incapable of Exercising Legitimate and Meaningful Discretion in Consideration of His Motion to Dismiss the Indictment Obtained in Violation of ***Kastigar v. United States****, 406 U.S. 441 (1972), and in Consideration of Numerous Trial and Post-Trial Rulings That Required the Exercise of Discretion.*

A. Introduction And Material Facts

During the proceedings, it became apparent that Judge Porter had serious difficulties remembering and understanding much of the evidence. His difficulties were most noticeable during arguments regarding abstract legal issues. As the examples will demonstrate, he frequently could not maintain a thought long enough, nor remember the words necessary, to complete a sentence. There were occasions when he could not remember his own previous rulings in the instant case, or even who was on trial.

Judge Porter attempted to compensate for his difficulties by requiring counsel to present all matters in writing. His written

orders reflect a coherence which he could not maintain on the bench. Therefore, counsel must assume that someone other than Judge Porter was the author of those written orders. This assumption was confirmed during the sentencing of the co-defendant, Curtis Holub, when the judge did not realize that his written order contained certain findings until after he read the order in open court. App. at 60-63. Having no other remedy during the midst of trial,[1] counsel spent considerable time attempting to help the judge recall and understand the issues before him.

After the transcript had been created for appeal, counsel sent a representative sample of the transcript pages to Stephen J. Chiulli, Ph.D., an expert in neuropsychology, for his review. Dr. Chiulli's affidavit, his curriculum vitae and the transcript pages he reviewed were part of the record on appeal. App. at 16-63.

Obviously, counsel could not provide Dr. Chiulli with Judge Porter's medical records. Therefore, Dr. Chiulli's ability to reach a definite conclusion was severely hampered. Nonetheless, Dr. Chiulli's affidavit expresses his expert opinion that two major problems in cognitive functioning occur consistently throughout the transcripts and that these problems "are likely to have a negative impact on the judge's ability to adequately process the material presented to him in any form." App. at 17. According to Dr. Chiulli, the most frequent problem is a serious difficulty in finding the appropriate word. This problem arises in individuals who cannot retrieve specific words and try to compensate for that problem by circumlocution; i.e., speaking around the issue. The second problem is memory difficulty.

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[1] During the oral argument in this case before the Eighth Circuit, the government argued that counsel should have attempted to recuse Judge Porter or seek assistance from the Chief Judge of the District. Chief Judge Richard S. Arnold responded to that argument by saying that the petitioner's only remedy was in the Circuit because the Chief Judge of the District had no authority over a judge the Circuit had designated.

Based on the material he reviewed, it was Dr. Chiulli's opinion that "the individual identified in the transcript as 'the Court' seek immediate medical attention." App. at 17. Based on this affidavit, counsel requested that the appellate court reverse petitioner's conviction or remand the case for a hearing to determine Judge Porter's mental competency to preside as a judge pursuant to Article III of the United States Constitution. The appellate court did neither. Although it considered the arguments "serious," the appellate court found any error in the proceedings to be harmless. App. at 15.

In addition to the pre-trial *Kastigar* issue, the petitioner's trial and sentencing involved many complex discretionary rulings. The proceedings required the active presence and participation of a judge to protect the petitioner's rights. This petitioner did not have the constitutionally mandated benefit of such a judge.

B. The Transcript Establishes the Judge's Mental Incapacity to Make Discretionary Rulings.

The transcript is replete with illustrations of Judge Porter's inability to make discretionary rulings because he could not fully understand the nature and substance of the evidence. The following are a few of the most glaring examples and are taken from the transcript pages reviewed by Dr. Chiulli: App. at 23-63.

1. Judge Porter habitually was unable to formulate coherent sentences.

> THE COURT: Any one of those, I don't think there's any dispute, legally, about that, and if you ask him and he says—he denies it, or something, why, then I would—you could follow up, but it's all contained within this pasture here, and it's really—you really ought to propose to me the questions you want to put to him rather than I should try to guess what you're going to do and follow you around.

MS. HOLLANDER: I'm happy to do that, Your Honor, ...

App. at 30.

MS. HOLLANDER: Is the Court ruling then? I need a ruling on this, Your Honor.

THE COURT: I'm ruling this—How we heard counsel state, at my request, counsel contended essentially, by and large, I agree with that.

MS. HOLLANDER: Is the Court then denying my request to take this witness outside the presence of the jury and do a complete proffer of the cross-examination?

THE COURT: Yes.

(The side-bar conference ended.)

THE COURT: Please proceed, counsel.

App. at 30.

THE COURT: Then if I were to give an instruction to the jury I'm going to give one on this similar acts anyway, but instruct the jury that—or—it isn't an instruction, but in some manner the jury could be advised that the—well, I could advise the jury that I'm only permitting—that—in some manner, this very thing, that your only contention—stipulation that the transcript is to be understood and—the recording is to be understood as—it's the Government's position that they rely on the—solely on the testimony of—I don't want to just get something—

App. at 32.

MR. REINERT: You're going to play just the final portion, Your Honor?

THE COURT: All right—That's right. I would consider more seriously playing it all, but perhaps that might tend to the—it is and it isn't. Maybe I just—In a way, I don't think it's as big as—15 minutes later I'm not sure.

Do you have anything parting?

App. at 33.

THE COURT: No, no. It's difficult really to be fully conversant with all of the aspects that have to be considered, and this is—I don't—this is—I don't consider this—in fact, the one that I was looking at when I was announcing that I was adopting that had been filed with the clerk, but it was made up by the prosecutor, and I'm certainly if there's some part that—Well, I think your record is—of objecting is made.

App. at 45.

2. Judge Porter did not remember that he had previously ruled on petitioner's motion to suppress evidence.

MS. HOLLANDER: —and we contend that that is tainted by the statement he gave where he didn't have his Fifth Amendment privilege.

We also contended that that consent to search was involuntary because he had no *Miranda* warnings and because he was in a hotel room surrounded by four or five officers who were telling him he should cooperate.

THE COURT: Well, I can have a hearing to determine whether he gave whether he was—just a minute—two different things—

MR. REINERT: Your Honor, this suppression motion, we previously had a hearing in front of the magistrate, and the Court has already denied this motion.

MS. HOLLANDER: That's correct, Your Honor, but the law requires us to make that again at trial.

THE COURT: That's all right.

MS. HOLLANDER: I'm doing it now.

App. at 25.

3. Judge Porter forgot that only one defendant was on trial.

(Side-bar conference out of the hearing of the jury.)

MS. GINSBERG: We would object to the admission of this evidence on the grounds that it's irrelevant to Mr. Wiley; that it's more prejudicial than it is probative, and also that it is 404(b) evidence not related to the conspiracy that is charged, and on those bases we would object to the admission of this evidence.

THE COURT: Who—is 404(b)—against who?

MS. GINSBERG: This is a drug deal between Mr. Mottinger and Mr. Holub—

THE COURT: I mean, who's being—which individual is getting the 404(b) other acts against him?

MS. GINSBERG: Mr. Wiley—I assume that this is being offered against Mr. Wiley or the prosecutor wouldn't be trying to put it into evidence. . . . .

App. at 26.

4. Judge Porter frequently could not keep track of the exhibits or of the witnesses.

MS. HOLLANDER: Your Honor, I'd like the clerk to mark this exhibit as Defendant's Exhibit A, and I'd move it into evidence at this time.

THE CLERK: It will be marked as Exhibit 69.

MR. REINERT: Your Honor, I believe that's just a demonstrative exhibit.

THE COURT: But it's a way to keep track of it.

MS. HOLLANDER: Your Honor, I'd like the witness to come down and initial it, and we would offer it into evidence at this time.

THE COURT: Well, ordinarily these are only for—used for the purpose of enabling the jury to follow and it's not ordinarily taken in as an exhibit, so you can use it as an illustrative method, counsel.

MS. HOLLANDER: Okay. Your Honor, I would like the—if I may ask the witness to initial the exhibit?

THE COURT: To do what?

MS. HOLLANDER: To initial the exhibit. I'm offering this into evidence as real evidence, and I'd like the witness to initial the exhibit.

THE COURT: Well, we'll have to reserve ruling on that. Please proceed.

MS. HOLLANDER: I have nothing further.

THE COURT: Now, I'd like—Can you remain there for a moment? I'd like to have counsel meet me at the bar for a brief time.

(Side-bar conference out of the hearing of the jury.)

THE COURT: I don't think I'm understanding you, I guess, but while I'm at it, it is true, it's okay with me if you mark up sheets like that, but 90 percent of the time my experience has been that it will be—it's okay to illustrate it to the jury, but I don't mark it as a permanent—What is the objection that you made?

MS. HOLLANDER: I understand, Your Honor, but since the witness has talked about this and he has confirmed the validity of this, I'm offering it as a real exhibit—

THE COURT: You're offering what?

MS. HOLLANDER: This piece of paper with his initials on it, I'm offering this as real evidence in this case, not just as demonstrative evidence, your Honor . . . .

App. at 27-28.

THE COURT: This is 19 and 45?

MS. HOLLANDER: 33, Your Honor.

MR. REINERT: 19, 45 and 33.

MS. HOLLANDER: These are the two I'm addressing now, 33 and 45.

THE COURT: All right. 19 and 43 (sic) you're addressing, I'll deal with that, then.

MS. HOLLANDER: I'm addressing at the moment— You've already ruled on 19, so now I'm addressing 33 and 45 together because I think the Government will probably move to admit them one after the other.

THE COURT: Uh-huh.

MS. HOLLANDER: We do—

THE COURT: Just a second. Make the offer now so that I know exactly what you're offering.

MR. REINERT: 33 and 45.

THE COURT: Which exhibits?

MR. REINERT: 33 and 45. Those are the two you have in your hand, Your Honor.

App. at 29.

5. Judge Porter was not able to make his own co-conspirator findings, as required by *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978). As an aid, he requested that the prosecutor provide him with a list of the *Bell* conspirators. The prosecutor did so but failed to include the principal co-conspirator, Patrick McMickle, in the list. While the judge was reading the list, the prosecutor realized his omission and informed the judge that he had left out McMickle. Judge Porter paused for a considerable period of time before he realized that the government's preliminary summary of

the evidence, upon which he was relying, did not include the central co-conspirator. App. at 35, 36, 45.

6. Judge Porter's attempts to formulate jury instructions were among the most noticeable and most painful of his mental failings to watch. Initially, he told the jury to come in ready to hear the instructions and closing arguments and begin deliberations at 9:00 am. He then took most of that day ostensibly to settle instructions while the jury waited. During the entire day, however, he never met with counsel to settle the instructions. When he finally appeared with his set of instructions, he would not permit petitioner's counsel to make objections, announcing that he would do so after the jury retired to deliberate. App. at 36, 42-44. He read the instructions from approximately 5:30 pm until approximately 7:00 pm. The lengthy reading was the result of his inability to look up from the page without losing his place. Each time he lost his place he would have to begin reading the instruction again.

> Earlier on this page I did refer to a Count 10—I intended to refer to Count 10, but I said Count 2, but I referred to Count 7. That's the one I took, and then the next one was Count 10. So those are on page 12. You'll have this same set of instructions typed which I'm reading to you that will go into the jury room with you and you can refer to it at your leisure.

App. at 37.

> Under Count 10, the Indictment charges that Jeffrey Wiley did knowingly and intentionally possess with intent to distribute, and did aid and abet the possession with the intent to distribute, a specified amount of marijuana, a Schedule I controlled substance, on or about February 22nd, 1988"—
>
> Well, members of the jury, I will read what is 13 so that I put both these together.

App. at 37, 38.

> The page I just finished reading, members of the jury, I left one and a half lines out, so I'll read it to you again. "The law recognizes two kinds of possession: actual possession and constructive possession." The lines I left out I'm reading to you now. "A person who knowingly has physical control over a thing, at a given time, is then in actual possession of it"—I'll finish the page. "A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. Constructive possession is knowledge of presence plus control. A person has constructive possession"—You'll recognize that I've read this part to you.

App. at 38, 39. At one point he became hopelessly confused. He moved papers around on his desk in a seemingly random manner for several minutes until he finally announced a recess. Court was in recess from 6:07 p.m. until 6:33 p.m., during the middle of the charge to the jury. App. at 40.

When Judge Porter returned, he read the instructions relating to one count which he had previously omitted in its entirety. The prosecutor realized that the instruction did not include a necessary requirement that the jury find the elements beyond a reasonable doubt. The prosecutor attempted to explain this to the judge and requested that he add the necessary language. Judge Porter did not seem to understand the problem; he read the incorrect instruction a second time. App. at 41, 42.

Judge Porter finally concluded his charge to the jury and the jury began deliberating. He then belatedly allowed counsel to argue the instructions and realized that he had improperly instructed the jury. When the jurors arrived at 9:00 am on the following

morning, he locked the members of the jury out of their room, sent them to lunch at 10:29 a.m. (App. at 44) and finally read the entire set of instructions again, including the corrected ones. The second reading also contained numerous instances of repetition:

> Well, members of the jury, you'll have these in the jury room, so you can look at them any time, but I'm reading on page 19, and I'm talking about Count 12 and I may have omitted inadvertently a few lines, and it wouldn't really—perhaps I could do this in this manner: I've already read the elements of Count 12 to you really twice, and that's what I just finished doing, and but—so I will just give you this much. Now, this relates, as I said, to Count 12, page 19.

App. at 49; *see also* App. at 45-53. Judge Porter continued to have these difficulties during the second reading even though his courtroom deputy sat next to him in the witness chair turning the pages and pointing out to him where he should begin reading again, whenever he lost his place.

7. Judge Porter's condition had perceptibly worsened by the time he sentenced petitioner, four months after the trial concluded. At the sentencing hearing, he was wholly unable to grasp the matters raised during the evidentiary hearing and could not process information fast enough to take account of the testimony. When counsel contested the probation officer's statement in the PSR that petitioner refused to provide her with information, Judge Porter thought counsel was referring to acceptance of responsibility.

> THE COURT: Well, I'm not very hopeful on that. He has a right— He doesn't have to speak to the probation officer, and I can't penalize him for doing it, but he doesn't earn something that would be like an extra credit, for instance, by—if he elects not to. And I've had a lot of those, and there's—it's pretty—you really have to be pretty definite about how you admit to the alleged offense, very

close to that, and—unless he's—if he wants to do that, it's not too late. It will never be too late until time—until sentence is imposed.

App. at 54, 55.

Judge Porter then announced that the petitioner had not provided the court with any evidence regarding his assets (App. at 57) even though, just moments before, the court had heard detailed testimony from the petitioner's brother and received extensive documentary evidence on this very subject.

8. At the co-defendant, Curtis Holub's, sentencing, which was made a part of the record below (App. at 60-63), the government argued for inclusion of the cost of incarceration in the fine. Judge Porter did not know what the government was talking about, saying "I'm not sure it's a necessary part of the sentence . . . ." App. at 61. At the conclusion of the hearing he began reading a written judgment and sentence that had previously been prepared. He read, "While the defendant is incarcerated in the Bureau of Prisons." At that point he stopped and said, "I guess I have anticipated this and I have it in there." App. at 63. This statement verified what counsel had surmised, that someone, probably a law clerk, was preparing the written orders and that Judge Porter was not aware of their contents.

C. The Trial Judge Could Not Engage in a Legitimate and Meaningful Exercise of Discretion.

Under the American system of jurisprudence, the right to a fair trial must include the meaningful exercise of discretion in the first instance, not merely a record that is reviewed for abuse of discretion or harmless error. By limiting its review to abuse of discretion and harmless error, the appellate court sanctioned the trial court's inability to formulate discretionary rulings and treated

the trial judge's incapacity as harmless.[2] "Mental incompetence is at least as serious a defect as prejudice or interest on the part of a judge, both of which have already been held constitutionally impermissible." *Smith v. Cox*, 435 F.2d 453, 460 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971). In *Smith*, a state prisoner argued that the judge who presided over his case and sentenced him had not been competent. The Fourth Circuit held that the allegations warranted further exploration. The allegations in the instant case also warranted further exploration because the instant case involved many complex discretionary rulings, including the ruling on the *Kastigar* motion. Judge Porter was simply unable to make the rulings necessary in the instant case. All the petitioner could do was appeal to the Circuit and the Circuit refused to consider his request that the appellate court consider ordering a mental evaluation or review Judge Porter's medical records.

Judge Porter's inability to make discretionary rulings undermined the entire trial. Courts have held that "a failure to exercise any discretion, and the resulting failure to engage in any meaningful consideration of . . . [the] question, constitutes an abuse of that discretion." *Metropolitan Life Insurance Co. v. Usery*, 426 F. Supp. 150, 171 (D.D.C. 1976), *aff'd*, 736 F.2d 727 (D.C. Cir. 1984). In that case, the court found that because there had been no meaningful consideration of what would be an appropriate exercise of discretion, the result was an abuse of discretion. Similarly, in *United States v. Guglielmi*, 929 F.2d 1001 (4th Cir. 1991), that court held that a district court judge failed to exercise discretion meaningfully in denying the defendant's motion to reduce sentence, and remanded to the district court for reconsideration of that issue. Essentially the appellate court found that the lower court had failed to balance certain factors in

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[2] In a habeas action where the petitioner argued that his sentencing by a judge suffering from a mental illness was a per se violation of due process, the Eighth Circuit also required a showing of harm or prejudice to warrant relief. *Wabasha v. Solem*, 694 F.2d 155, 159 (8th Cir. 1982).

weighing the proper sentence to impose. Therefore the district court had "failed to exercise its discretion discernably or meaningfully. It has not sufficiently balanced, or demonstrated a balancing of, the nature and character of the offense against Guglielmi's records and his personal character as mandated by Rule 35 and the law of this circuit." *Id.* at 1005.

D. This Court Should Act to Preserve Civilized Standards of Procedure and Evidence.

"Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332 (1943). In *McNabb*, this Court invoked its supervisory power because the "petition for certiorari presented serious questions in the administration of federal criminal justice." *Id.* at 333. The petitioners in *McNabb* were subjected to procedures by officers assuming functions not authorized by Congress. The Court stated that the

> civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

Id. at 616. This petitioner could not look to the trial judge to provide the "learning, good sense, fairness and courage" that this Court considers essential for the fair administration of federal criminal justice.

In the years following *McNabb*, this Court has continued to use its supervisory power, although sparingly, when necessary to ensure that criminal justice is administered properly. This has included numerous cases involving discretionary rulings by the lower courts which this Court found to be abusive. In *Grunewald v. United States*, 353 U.S. 391 (1957), this Court found that a discretionary ruling on an evidentiary issue had "grave constitutional overtones." *Id.* at 423. The ruling at issue was the probative value of a defendant's invocation of his privilege against self-incrimination before the grand jury.

Only two years later, this Court again used its supervisory power to reverse a conviction for abuse of discretion in *Marshall v. United States*, 360 U.S. 310 (1959). In that case, some of the jurors had seen newspaper articles about evidence which the trial court had excluded from the trial. The trial judge had interviewed each juror individually and had found that each was not influenced by the articles and that, therefore, the defendant had not been prejudiced. Although this ruling was within the judge's discretion, this Court again felt constrained to intervene to "apply proper standards for enforcement of the criminal law in the federal courts." *Id.* at 313.

This Court reversed a discretionary ruling on an evidentiary matter again in *United States v. Hale*, 422 U.S. 171 (1975), because the lower court had found no error in admitting evidence of the defendant's silence at the time of arrest to impeach his alibi at trial. This Court found that permitting the cross-examination of the defendant regarding his silence at the time of arrest was an abuse of discretion and reversed his conviction.

These cases share a common thread of concern over the exercise of discretion by trial judges when that discretion interferes with the proper standards of enforcement of justice in the federal courts. Nothing less can be said of the instant case. By finding that any error was harmless, the appellate court avoided its obligation to enforce the proper standards of criminal justice and

guarantee to this petitioner the "learning, good sense, fairness and courage" of the federal judge the appellate court had designated to hear his case.

This question cannot be subject to a harmless error analysis because it involves "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona v. Fulminante*, 499 U.S. 279,___, 111 S. Ct. 1246, 1265 (1991) (Rehnquist, C.J.); *see also Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993). The inability of a trial judge to perform the acts required of him goes to the essence of the criminal justice system. It is the trial judge who must sit as arbiter, determine what evidence the jury may or may not consider, determine when to instruct the jury and in what words, apply the law to the facts, weigh the credibility of witnesses at pre-trial and post-trial proceedings. All of these decisions must be based on reason and consideration.

The appellate court's finding that the trial judge issued rulings that were not clearly erroneous does not mean this petitioner received a fair trial. A criminal case is not decided by the law of averages or by guesswork or by law clerks, no matter how bright they may be. The United States Constitution guarantees to this petitioner the right to a judge who can exercise meaningful and legitimate discretion. This Court should reverse petitioner's conviction and remand for a new trial before a judge who meets the requirements of Article III of the United States Constitution.

CONCLUSION

For the foregoing reasons, petitioner Jeffrey Wiley respectfully requests that this Court grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, and reverse his conviction.

Respectfully submitted,

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